2. Can a violation of the Federal Boiler Inspection Act be predicated only on a violation of an order of the Interstate Commerce Commission?

3. Do the orders of the Interstate Commerce Commission, requiring a part or appurtenance—such as a rear headlight—to be provided and maintained in good condition on a locomotive, exempt the carrier from violation of the Federal Boiler Inspection Act when such part or appurtenance is in bad order and by reason thereof causes or contributes to an injury to its interstate employee, except when the injury is suffered at the precise time and under the exact circumstances and in connection with the momentary particular use to which the locomotive is then being put, contemplated by a narrow and strict interpretation of the language of the Interstate Commerce Commission orders?

4. Is a rear headlight permanently affixed to the rear of a tender of a locomotive, a part and an appurtenance of the locomotive within the purview and command of the Federal Boiler Inspection Act itself, and required thereby to be in proper condition and safe to operate in the service to which the same is put without unnecessary peril to life or limb, irrespective of any order which the Interstate Commerce Commission has promulgated on the subject?

5. Does the Boiler Inspection Act require only that a locomotive and its parts be in such condition that no additional perils be "created", or does it require that they be in such condition that all unnecessary perils be avoided?

6. When a cause is tried to a jury on the uncontested theory and premise that the coal car was equipped with an inefficient hand brake which, although set, permitted it to

drift from a safe place to a place fouling the main track, and substantially undisputed evidence to that effect is admitted expressly without objection, is the Appellate Court authorized to reverse a jury's verdict upon the ground that it was error to allow full damages if the jury found that the hand brake on the coal car was inefficient and permitted it to drift from a safe to an unsafe place and thereby contributed to cause the injuries?

7. Can the right to a trial by jury, and to a jury's proper determination, of the issues of fact with respect to violation by the carrier of the Federal Safety Statutes, and the desirable uniformity in the determination and enforcement of federally created rights under such statutes in conformity with the federal decisional law, be denied and thwarted in the state courts, by the limitations, restrictions and technicalities of the local law and the rules of court relating to and regulating practice and procedure governing appeals and other forms of review?

8. Has the relator been denied the right to trial by jury, and to the jury's proper determination, of the issues in the subject action?

IV.

Summary Statement of Matters Involved.

Relator brought an action (R. 3-6) in the Superior Court of Cook County, Illinois against The New York, Chicago & St. Louis Railroad Company; duly demanded a trial by jury (R. 6, 8) and recovered judgment (R. 8-10) entered on the jury's verdict for $40,000 for personal injuries under the Federal Employers' Liability Act (45 U.S.C. Sec. 51 *et seq.*), the Federal Safety Appliance Act (45 U.S.C. Sec. 11) and the Federal Boiler Inspection Act (45 U.S.C. Sec. 23).

The railroad company admits its liability under the Federal Employers' Liability Act (R. 11, 28).

Relator, a brakeman employed by the railroad company as a member of a crew of an interstate freight train, was riding on the stirrup on the southwest corner of the tender of a locomotive as it backed west on the main track in defendant's dark, unlit Fort Wayne Railroad Yard at about ten minutes before midnight on November 14, 1946. The light on the rear of the tender was out of focus, throwing its rays up instead of down toward the track, according to the testimony of the plaintiff and according to the opinion of the Appellate Court,

> "an issue of fact to be determined by the jury was created if this alleged defect in the light can be made the basis of an action under the Boiler Inspection Act".

A spur track came off the main track at an angle to the south and west. When close to the junction of the spur track, petitioner saw a coal car on the spur track admittedly too close to and fouling the main track. Petitioner attempted to get around the corner of the tender, but before he could do so he was caught by the coal car and sustained injuries for which he brought suit. (R. 11-15, 28)

The jury was instructed that under the Federal Boiler Inspection Act it is the defendant's duty to furnish a locomotive, its boiler, tender and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put and that may be employed in active service without unnecessary peril to life or limb, and that if the jury should find from the greater weight of the evidence that the defendant failed to equip its locomotive and tender with an efficient and properly focused light and that to equip such locomotive and tender with such a light caused, or proximately con-

tributed to cause, unnecessary peril to life or limb of the plaintiff and made the locomotive unsafe to operate in the service to which the locomotive and tender were put, it might then find that the defendant had violated the Federal Boiler Inspection Act and that, if it should further find that the furnishing of such a locomotive and tender with a light that was dim and out of focus directly and proximately caused injuries to be sustained by the plaintiff, then, even though the jury might find from the greater weight or the preponderance of the evidence that the plaintiff was guilty of contributory negligence, the Federal Boiler Inspection Act denies to the defendant and deprives the defendant of the defense of contributory negligence on the part of the plaintiff, and such contributory negligence, if any, would not act as a bar or diminish the right of the plaintiff to recover full damages for such injuries, if any, he has sustained. (R. 17-18)

The Appellate Court held that the giving of this instruction constituted reversible error because,

> "Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, is not liable under that act if a light installed but, not required by the act, was not properly focused. No claim can be made that the projection of the rays of this light into the air created an 'unnecessary peril to life or limb' in the operation of the engine."

The basis of this ruling was that neither of the orders of the Interstate Commerce Commission specifically relating to rear lights, namely Rule 129 or Rule 131, required any rear light at the precise time at which, and under the particular circumstances under which, relator was injured, namely when a road engine was backing to couple on to its train. (R. 13-14).

At the trial of the action the railroad company did not contest its liability under the Federal Safety Appliance Act. In opening the defendant's case to the court and jury, defendant's counsel, admitting that the coal car was too close to the main track, stated:

> "Now I notice what Mr. Fuerst said about how the car got there. I don't know if it was put there, or whether it had drifted there. In other words, if the brakes were defective in holding the car."

It offered no evidence to contradict the testimony of the relator that on going to work around 9:15 to 9:30 P.M., he saw the coal car on the spur track about ten feet from the switch and a regular yard brakeman was setting the brake on it (R. 11-13), and the further testimony of plaintiff (R. 42-45) that when brakes are set on cars and they are functioning efficiently, they hold the cars in place where they are braked, and if they are not functioning efficiently, the car will drift on a slope. Relator further testified, expressly without objection which was withdrawn after it had been sustained, (R. 43-44) as follows:

> "Q. What would you say, from the point where the brake was applied, where you saw it applied where this car was in the clear, to where the car was when you started to work with your engine and your body came in contact with that car, whether that brake was efficient?
>
> "Mr. Moir: I object to that, if your Honor please.
>
> "The Court: Objection sustained.
>
> "Mr. Fuerst: May I respectfully—
>
> "Mr. Moir: Just a minute, if your Honor please. I withdraw the objection. Proceed.
>
> "The Court: All right.
>
> "Mr. Moir: Have the question read.
>
> (Question read.)
>
> "A. No, I would say it wasn't.

"Mr. Fuerst: Q. When brakes are set on cars and they are working efficiently do they permit the cars to drift?

"A. No, sir."

The trial court charged the jury that under the Federal Safety Appliance Act it was the defendant's duty to provide safe and efficient hand brakes on all cars used or hauled on its railroad, and that if the jury found from the greater weight of the evidence that defendant failed to equip the cars on the spur track with efficient hand brakes, that the omission to have efficient hand brakes on such cars directly and proximately caused the cars to drift or move from the position they had originally occupied when the brakes were set to a place where they would foul the O.P. Main track, and that such failure or omission directly and proximately caused injuries to be sustained by the plaintiff, then, even though the jury found from the greater weight of the evidence that plaintiff was guilty of contributory negligence, the Federal Safety Appliance Act denies to the defendant, and deprives the defendant, of the defense of contributory negligence on the part of the plaintiff, and such contributory negligence, if any, will not act as a bar to plaintiff's right to recover full damages for such injuries, if any, he has sustained. (R. 18-19)

The Appellate Court held that the proceedings and evidence referred to and the other evidence in the record did not warrant the giving of that instruction (R. 12-13, 14), and thereby invaded the province of the jury, and for all time, has denied, disregarded, and deprived the relator of his inherent and guaranteed statutory and constitutional rights to the jury's proper determination thereof, under the Safety Appliance Act and the decisions of this Court.

V.

REASONS FOR ALLOWANCE OF WRIT.

1. The decision of the Appellate Court which the Supreme Court of Illinois has refused to review, denudes the Federal Boiler Inspection Act of its primary, positive and clear command, and substitutes therefor rules of the Interstate Commerce Commission too narrowly construed, and is capricious, arbitrary and void and contrary to the provisions of the act and to the controlling federal decisional law. Federal Boiler Inspection Act, 45 U.S.C. Sec. 23; I.C.C. Rules 101, 129, 131, C.F.R. Title 49, Parts 1-91, Secs. 91.1 pp. 1236; *Tiller* v. *Atlantic Coast Line Railroad,* 32[illegible] U.S. 574; *Southern Ry. Co.* v. *Lunsford,* 297 U.S. 39[illegible] *Lilly* v. *Grand Trunk Western Railroad Co.,* 317 U.S. 481; *Louisville & N. R. Co.* v. *Botts,* 173 F. (2d) 164; *Bolan* v. *Lehigh Valley R. Co.,* 167 F. (2d) 939; *Hines* v. *Smith,* 275 Fed. 766.

2. The right to a trial by jury and to the jury's proper determination of the issues with respect to violation of the provisions of the Federal Boiler Inspection Act and the causal connection of such violation with the injuries sustained by the relator has been finally and irrevocably denied the relator by the decisions of the Appellate Court of Illinois and of the Supreme Court of Illinois in violation of the relator's right to such jury trial under the provisions of the 7th amendment of the Constitution of the United States, and relator has been denied equal protection of the laws contrary to the provisions of the 14th amendment of the Constitution of the United States and to the Federal Decisional Law governing and controlling the determination and enforcement of the relator's federally created rights. *Wilkerson* v. *McCarthy,* 336 U.S. 53; *Bailey* v. *Central Vermont Ry.,* 319 U.S. 350; *Brady* v. *Southern Ry.*

Co., 320 U.S. 476; *Urie* v. *Thompson*, 337 U. S. 163; *Brown* v. *Western Railway of Alabama*, 338 U. S. 294.

3. The decisions of the State court of Illinois in this cause violate the rule of desirable and essential uniformity in the adjudication of federally created rights and decide federal questions contrary to the applicable and controlling federal decisions. *Brown* v. *Western Railway of Alabama*, 338 U. S. 294; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476.

4. The public at large, as well as all railroad employees and common carriers by railroad engaged in interstate commerce, will be irreparably injured and damaged, and their rights destroyed, and endless abortive litigation will be engendered, if the opinion of the Appellate Court of Illinois for the First District, which the Supreme Court of Illinois has refused to review, be permitted to stand. The opinion of the Appellate Court has been ordered to be published in full under Rule 36 of that court, providing for the publication of only such decisions "as contain a discussion of a new or doubtful question of law, or involve the application of rules of law to a novel state of facts, or decide a new or unsettled question of practice" and will be cited and considered as authority for the non-liability of a carrier which permits a rear headlight or any other part or appurtenance of a locomotive to be out of order and ineffective unless an order of the Interstate Commerce Commission requires the safety device to be in good order at the particular time and for the particular use to which the locomotive is then being put. Rule 36 of the Appellate Court of Illinois for the First District; *Woods* v. *New York, Chicago & St. L. R. Co.*, 339 Ill. App. 132, 88 N.E. (2d) 740; *Fairport P. & E. R. Co.* v. *Meredith*, 292 U. S. 589.

5. The opinion of the Appellate Court, which the Supreme Court of Illinois has refused to review, with respect to the violation of the Federal Safety Appliance Act is

contrary to the controlling federal decisions with respect to the sufficiency of evidence in order to make an issue of fact for a jury determination and is contrary to the law of the State of Illinois and to the fair administration of justice in any jurisdiction with respect to trial of a cause involving uncontested issues. *Affolder* v. *New York, C. & St. L. R. Co.*, No. 200, Oct. Term 1949, decided March 13, 1950, 70 S. Ct. 509; *Lavender* v. *Kurn*, 327 U.S. 645; *Myers* v. *Reading Co.*, 331 U. S. 477; *Cusson* v. *Canadian Pacific Ry. Co.*, 115 F. (2) 430; *Eker* v. *Pettibone*, 110 F. (2) 451; *Spotts* v. *Baltimore & Ohio R. Co.*, 102 F. (2) 160; *Anderson* v. *Baltimore & O. R. Co.*, 89 F. (2) 629, certiorari denied 302 U.S. 696; *Didinger* v. *Pacific R. Co.*, 39 F. (2) 798; *Pennsylvania R.R. Co.* v. *Auchenbach*, 16 F. (2) 550; *Brown* v. *Western Railway of Alabama*, 338 U.S. 294; *Williams* v. *New York Central R. Co.*, 402 Ill. 494; *Oscanyan* v. *Arms Co.*, 103 U.S. 261; *Anderson* v. *Chesapeake & O. R. Co.*, 352 Ill. 561; *Allen* v. *United States Fidelity & Guaranty Co.*, 269 Ill. 234; *Peterson* v. *General Rug & Carpet Cleaners*, 333 Ill. App. 47; *Kluska* v. *City of Chicago*, 97 Ill. App. 665.

PRAYER.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue out of this court directed to the Supreme Court of the State of Illinois, commanding said court to certify and send to this court the record of the proceedings in the above entitled cause, being cause No. 31427 in said court, including also the record and proceedings in cause No. 31428 entitled, *William Edward Woods, Plaintiff-in-Error* v. *The New York, Chicago & St. Louis Railroad Company, Defendant-in-Error*, and cause No. 31429, entitled, *William Edward Woods, Petitioner* v. *The New*

York, Chicago & St. Louis Railroad Company, a corporation, Respondent, to the end that said causes may be reviewed and that the proceedings therein be determined by this court as of right and justice ought to be done, and that the judgment of the Appellate Court of Illinois for the First District, entered in the subject action on November 21, 1949, be expunged or reversed and the judgment of the Superior Court of Cook County, Illinois, entered in the subject action on May 7, 1948, be affirmed and reinstated.

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS, *Petitioner,*

By HARRY G. FUERST and
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77 West Washington Street
Chicago 2, Illinois

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

Opinion Below.

The opinion of the Appellate Court of Illinois is officially reported in *Woods* v. *New York, Chicago & St. Louis R. Co.,* 339 Ill App. 132. It is also reported in 88 N. E. (2d) 740.

The Supreme Court of Illinois has delivered no opinion. Its order denying petitioner's motion for leave to file an original petition for writ of mandamus is contained in the record, pp. 96-97, fol. 36, and its order denying petitioner's motion for reconsideration of said order is contained in the record, pp. 102-103, fol. 43.

2.

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are:

1. Under Section 1651 of Title 28 of the United States Code, and in the exercise of the inherent jurisdiction of this Court to issue all common law writs necessary and appropriate in aid of its jurisdiction agreeable to the uses and principles of law, this Court has jurisdiction to determine, by such writ as may be needful to that end, the federal questions involved in the relator's claim of federally created rights and the federal questions herein arising under the Federal Employers' Liability Act (45 U. S. C. Secs. 51 *et seq.*) and the Federal Safety Appliance Act (45 U. S. C. Sec. 11) and the Federal Boiler Inspection Act (45 U. S. C. Sec. 23) and to preserve and

restore to the relator his right to a trial by jury and to the jury's proper determination of the issues arising under the Federal Safety Statutes, as guaranteed to him by the Constitution of the United States and of the State of Illinois, and as provided as a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act, and to enforce the rule announced by this court that uniformity in the adjudication of the federally created rights under the federal statutes involved herein is desirable and essential, whether the enforcement of such rights be sought in the state or federal courts. U. S. Constitution, Art. III, §§1, 2; 28 U. S. C. §1651; *Brown* v. *Western Railway of Alabama,* 338 U. S. 294; *Urie* v. *Thompson,* 337 U. S. 163; *United States Alkali Export Ass'n.* v. *United States,* 325 U. S. 196; *House* v. *Mayo,* 324 U. S. 42; *Ex Parte Republic of Peru,* 318 U. S. 578.

2. Under Section 1257(3) Title 28 of the United States Code, this court has statutory jurisdiction to review a final orders of the Supreme Court of the State of Illinois in the original proceeding for writ of mandamus in said court, which is the highest court of the State of Illinois, and to review the federal questions involved in relator's claim of federally created rights under the federal statutes above referred to, and in accordance with the method provided thereby, and by the Constitutions of the State of Illinois and of the United States, where a trial by jury of the issues has been properly demanded. 28 U. S. C. §1257(3).

The date upon which the orders sought to be reviewed became final is January 18, 1950.

3.

Statement of the Case.

The relator is the victim of procedural difficulties which threaten to inflict irreparable damage and injury upon him in the enforcement of his federally created rights under the provisions of the Federal Employers' Liability Act (45 U. S. C. Secs. 51 *et seq.*), the Safety Appliance Act (45 U. S. C. Sec. 11) and the Federal Boiler Inspection Act (45 U. S. C. Sec. 23).

Through the admitted negligence of his employer, a railroad common carrier, serious physical injury was inflicted upon him while he was performing his duties as an interstate freight brakeman at about midnight in his employer's dark, unlit railroad yard in Fort Wayne, Indiana, on November 14, 1946. His injuries were of such a serious character that the jury awarded him damages in the sum of $40,000.00. He alleged, and the evidence concededly warranted the jury in finding, that the rear light on the locomotive tender, on the side of which he was riding in the due and proper performance of his duties as it backed west on the main track, was out of order and out of focus and cast its light up into the air instead of along the tracks, with the result that he was unable to see a coal car in such a dangerous position on a spur track that it fouled the main track and did not afford sufficient clearance for the moving locomotive and tender until it was too late for him to get to a position of safety. The coal car, according to the claim and evidence of the relator, which the railroad company and its counsel did not dispute, had drifted from a safe position on the spur track, which it occupied when a regular yard brakeman applied the hand brake on it earlier in the evening, to its dangerous position, because it was not equipped with an efficient hand brake. (R. 11-14, 28-29, 42-45)

The judgment in favor of the relator has been reversed by the Appellate Court of Illinois for the First District with an opinion erroneously holding that the relator was not entitled to have the case submitted to the jury under the provisions of the Federal Safety Statutes and remanded for further proceedings in conformity with its opinion. As will appear from the opinion, the relator has been finally and irrevocably denied the right to recover under the Federal Boiler Inspection Act, in view of the basis upon which the Appellate Court's opinion proceeded. It is apparent that no amount or character of additional evidence can materially affect the basis upon which the Appellate Court proceeded with respect to the violation of the Federal Boiler Inspection Act.

Under the local laws of the State of Illinois and the rules of court relating to and regulating practice and procedure governing appeals and other forms of review, the relator has exhausted all proper remedies in the state courts for an appropriate order or judgment reversing or expunging the judgment of the Appellate Court and affirming or reinstating the judgment of the Superior Court of Cook County without success. (R. 29)

A retrial under the Appellate Court's opinion would merely be in effect an assessment of damages to which the relator is entitled, in view of the admitted liability of the railroad company under the Federal Employers' Liability Act, giving the railroad company the benefit of possible deduction in the amount of damages on account of contributory negligence on the part of the relator. In view of the facts, even as stated in the Appellate Court's opinion, which is more favorable to the railroad company than the record warrants, (R. 28) it is difficult to conceive that any jury would find that any negligence on the part of the relator contributed to his in-

jury,—certainly not in any degree that would, or should, materially affect the amount of damages to which he is entitled.

Even under the meager statement of facts, as set forth in the Appellate Court's opinion, it is apparent that the only basis for charging the relator with contributory negligence was his failure to see the fouling coal car before he did see it, or his failure to take some other action in the emergency when he discovered that he was in danger of being crushed to death,—in other words, his failure to have been born with cat eyes which could penetrate the darkness better than he or the engineer operating the engine could do, or better judgment in a sudden emergency, namely attempting to jump off the moving tender in the darkness and risk the danger of being thrown under its wheels.

On the other hand, it is apparent even from the statement of facts contained in the Appellate Court's opinion, that the railroad company's negligence was multiple and gross. In addition to admitted liability

> "in failing to provide the plaintiff with a reasonably safe place in which to work and in failing to provide sufficient clearance between the spotted coal car and the moving engine and tender" (R. 11),

it is apparent that the engineer operating the engine was grossly, almost criminally, negligent in operating the engine if the rear light was in proper condition and sufficient to show an object as large as a man either 800 feet away, as required by I. C. C. Rule 129, or 300 feet away as required by I. C. C. Rule 131, or any reasonable distance as must necessarily have been intended when the railroad company installed the rear light on the tender, even if not required to do so by either order of the Interstate Commerce Commission. And if the rear light shone

up in the air instead of along the tracks, we submit the new jury should be permitted to find, and that any jury would find, that the railroad company was negligent in permitting the light to be in that condition, even if it did not constitute a violation of the Federal Boiler Inspection Act.

4.

Specification of Errors.

The Supreme Court of Illinois erred:

1. In denying petitioner's petition for leave to file application for writ of mandamus.

2. In refusing to issue writ of mandamus commanding the respondents to expunge the judgment entered by the First Division of the Appellate Court of Illinois for the First District, and commanding the respondents to affirm the judgment of the Superior Court of Cook County.

5.

ARGUMENT.

Summary.

The rear headlight on the tender of the locomotive was a part and an appurtenance of the locomotive and tender within the scope and command of the Federal Boiler Inspection Act itself, and required thereby to be in proper condition and safe to operate in any service to which they were put, that they might be employed in the active service of the carrier without unnecessary peril to life or limb, irrespective of any orders or rules which the Interstate Commerce Commission has promulgated. The Boiler Inspection Act itself, unaided and unrestricted by any order of the Interstate Commerce Commission, requires that all parts and appurtenances of all locomotives and tenders used on the lines of an interstate common carrier by railroad, be maintained at all times in proper condition and safe to operate in the service to which they are put without unnecessary peril to life or limb. A violation of the Act does not have to be predicated on a violation of an order of the Interstate Commerce Commission. The orders of the Interstate Commerce Commission requiring (Rule 129) certain locomotives used in road service, and (Rule 131) all locomotives used in yard service, to be equipped with rear headlights, maintained in good condition, affording sufficient illumination to enable a person in the cab to see an object as large as an average sized man at a distance of 800 and 300 feet respectively, do not exempt a carrier from violation of the Act, if a light is installed, even if it be not strictly required by these orders, and is permitted to be out of focus and in bad or improper condition, entailing

unnecessary peril to a person required to ride on a backing tender through an unlit railroad yard in the darkness of midnight. On the contrary, the first rule of the Interstate Commerce Commission with reference to locomotives and tenders, (Rule 101) provides that,

> "The railroad company will be held responsible for the general design, construction and maintenance of locomotives and tenders under its control."

The Act does not require only that a locomotive and all its parts be in such condition that no additional perils be "created", but it does require that they be in such condition that all unnecessary perils be avoided. It is apparent that if the rear light in question was in such condition that its beam was thrown upward into the air instead of along the tracks, so that the dangerous position of the coal car could not be seen in time to avoid the very accident that occurred, the rear light, locomotive and tender were not in proper condition and safe to operate in the service to which they were being put without unnecessary peril to the relator; that the Boiler Inspection Act was violated; and that such violation caused or contributed to relator's injuries and authorized the jury to award him full damages, without any deduction for any possible contributory negligence on his part.

The evidence as to the inefficiency of the hand brake on the coal car, apart from the opening statement of counsel for the railroad company on the trial, was amply sufficient to warrant the jury to find that the brake was not efficient and permitted the coal car to drift from the safe place it occupied when the brake was applied to the unsafe place fouling the main track and causing relator's injuries, and warranted the instruction under the Safety Appliance Act. But beyond that, in view of the opening statement of the railroad company's counsel, however the learned jus-

tices of the Appellate Court saw fit to construe it, none can gainsay that the statement is subject to the interpretation that the railroad company was not contesting its liability under the Safety Appliance Act any more than that it was not contesting its liability under the Federal Employers' Liability Act. It offered no evidence to the effect that the brake was efficient and in proper working order, or any evidence with respect to the direction of the slope of the spur track, except the testimony of the three members of the crew, which is referred to in the Appellate Court's opinion. Contrary to the statement in the opinion of the Appellate Court that

> "the drift of the coal car toward the main track was impossible under the uncontradicted evidence that the spur track sloped to the west and away from the main track",

the railroad company's reply brief (p. 7) in the Appellate Court stated:

> "Reading the cold printed testimony of defendant's three witnesses, we concede that the words used by two of them (McKinney and Thomas) may be ambiguous as to whether the Clifford siding 'sloped' *up* or 'sloped' *down* from the O.P. main. The testimony of Farr that the siding 'slopes *away from* the O.P. main' (Abst. 135) plainly connotes a downward slant away. McKinney said the track 'slopes to the west' (Abst. 123) This *could* mean either an uphill or downhill slant. Webster's New International Dictionary (2d ed.) gives as one of the definitions of the verb 'slope,' 'to have a slant,' and as one of the definitions of the noun 'slope,' 'upward or downward slant or inclination.' Thomas said the Clifford siding has 'an incline to the West' (Abst. 138). In the same dictionary we find one of the meanings of 'incline' is 'ascent or descent.'"

> "If the only things we had to go by were those few words without the aid of Farr's testimony, we confess it might be embarrassing to tell which way the slant was."

Farr's testimony that the siding "slopes away from" the main track refers to horizontal distance—and not to vertical direction.

There is an inadvertent omission from the opinion of the Appellate Court as set forth in the Petition for Mandamus (R. 13). It should read: "The conductor said the spur slopes to the west; the fireman that it slopes away from the main track, and the engineer that it is an incline to the west" *Woods* v. *New York, C. & St. L. R. Co.,* 339 Ill. App. 132.

To permit the reversal of the judgment upon the ground that it was error to permit the jury to award full damages in the event that they found violation of the Federal Safety Appliance Act contributed to cause relator's injury, would be a mockery and a travesty upon justice. The theory upon which the case was tried was that there was no contest of this issue.

These propositions are so patently and indisputably true that the conclusion is inescapable that the learned justices of the Appellate Court reached their decision and rendered their opinion arbitrarily and capriciously in such flagrant violation of the recent teaching of this Court as to indicate hostility with which some judges, as this Court is aware, view this type of litigation and the resistance they display toward the rulings, especially the recent rulings, of this Court in these railroad cases.

This case presents an ideal vehicle for this Court to implement and enforce the "uniform federal rule" which is essential to the end that "litigants under the federal act receive similar treatment in all states", and that "the desirable uniformity in adjudication of federally created rights" in all courts, state and federal, be achieved.

I.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Boiler Inspection Act.

The Federal Boiler Inspection Act (45 U. S. C. Sec. 23) provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The tender of the locomotive involved in the subject action was equipped by the defendant with a rear light permanently affixed to the tender and forming a permanent and integral part of it. Therefore, the rear light became and was a part and an appurtenance of the locomotive, physically in fact and in legal contemplation. *Tiller* v. *Atlantic Coast Line Railroad,* 323 U. S. 574; *Southern Ry. Co.* v. *Lunsford,* 297 U. S. 398; *Hines* v. *Smith,* 275 Fed. 766.

The opinion of the Appellate Court stated:

> "In support of his action under the Boiler Inspection Act plaintiff testified that the light on the rear of the tender was out of focus, throwing its ray up instead of down toward the track. Members of plaintiff's crew contradict this testimony, and an issue of fact to be determined by the jury was created if

this alleged defect in the light can be made the basis of an action under the Boiler Inspection Act."

However, the Appellate Court held that since the Interstate Commerce Commission rules with reference to rear or back-up lights on tenders did not require any light on the tender in question at the precise time of relator's injuries because the locomotive was then being used in road service and was within the exception stated in I.C.C. Rule 129(b), no violation of the Federal Boiler Inspection Act could be predicated on the condition of the light.

The Interstate Commerce Commission rules, and its right or authority to promulgate rules, are purely ancillary to and in aid of the Federal Boiler Inspection Act and do not supplant its positive and basic command. The Appellate Court erroneously held, however, that it was necessary for the Interstate Commerce Commission to promulgate a rule, covering the precise movement or *use* of the locomotive and the particular and exact situation at the moment of injury, before any right of recovery can be predicated on a defective appurtenance, which is out of order and not in proper condition. In other words, it held in effect, that a bad light was better than no light, and since no light was required by the rules of the I.C.C., and the bad light did not "create" an additional peril, no violation of the Boiler Inspection Act can be based on the condition of the light. Therefore, the Appellate Court erroneously deprived relator of any right to recover under the Federal Boiler Inspection Act, itself.

The Appellate Court's opinion stated:

"Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused. No claim can be made that the projection

of the rays of this light into the air created an 'unnecessary peril to life or limb' in the operation of the engine."

Petitioner submits that this ruling is clearly contrary to the provisions of the Federal Boiler Inspection Act and to all of the decisions of the United States Supreme Court bearing on the subject, to which the Illinois Supreme Court in *Williams* v. *New York Central R. Co.*, 402 Ill. 494, has recently subscribed. The ruling finds no support in any authoritative or persuasive decision of any court in the nation, state or federal.

The decision of the Appellate Court in failing to recognize the fundamental requirement of the Boiler Inspection Act has denuded this Act of its primary, positive, clear command, namely: forbidding the use of any locomotive, boiler, or tender, and any parts and appurtenances thereof, which are not in proper condition and safe to operate in the service to which they are put without unnecessary peril to life or limb. Under this statute it was the defendant's duty to provide a safe locomotive and tender and all parts and appurtenances of both, irrespective of the rules of the Interstate Commerce Commission. The rear light on the tender was a part and appurtenance of the locomotive and tender; and it was for the jury, and not for the Appellate Court, to determine whether or not unnecessary peril contributing to relator's injuries was caused or created or was not avoided by the improper condition of the light. The Appellate Court seeks to substitute the rules of the Interstate Commerce Commission for the positive command of the Boiler Inspection Act. The Boiler Inspection Act is the basic, prime and dominant command from which arises the right of recovery for any defect of any part or appurtenance of a locomotive or tender, irrespective of the minimum require-

ments under any rules promulgated by the Interstate Commerce Commission.

No ruling or regulation by the Interstate Commerce Commission is necessary to bring within the scope or command of the statute a rear light which was in fact installed by the defendant on the tender as a permanent, integral and essential part thereof, and the fact that the Interstate Commerce Commission has promulgated rules regarding rear lights does not exempt from the statute a light or any other part or safety device which is actually and in fact a part or appurtenance of a locomotive or tender.

In *Tiller* v. *Atlantic Coast Line Railroad,* 323 U. S. 574, the locomotive was ordinarily used in road service and did not have any rear light. It was pushing a string of cars which would have obscured the light if there had been one. Holding that the Trial Court was correct in permitting recovery for violation of the Boiler Inspection Act, this Court said:

> "It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death.
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> • • •
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> "Assuming, without deciding, that the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight, even though directly obscured from the front, might easily have spread themselves so that one standing within three car lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark

> night in an unlit yard was potentially perilous to those compelled to work in the yard. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 64 S. Ct. 409. And 'The standard of care must be commensurate to the dangers of the business.' *Tiller* v. *Atlantic Coast Line Railroad, supra,* 318 U.S. at page 67, 63 S. Ct. at page 451, 87 L. Ed. 610, 143 A.L.R. 967."

In the subject action the backward movement of the engine was potentially perilous to the relator, who was required to ride through a dark, unlit railroad yard on the stirrup at the side of the tender with an inefficient headlight. If the headlight were properly focused, so that its rays of light shone along the ground instead of up into the sky, the relator's life and limb would not have been unnecessarily jeopardized. The position of the coal car fouling the main track would have been seen in time to avoid injury. The opinion of the Appellate Court deprives the relator for all time from any recovery under the Federal Boiler Inspection Act. To permit such a final decision to remain the law of the case at bar would be a travesty and a mockery of justice both as against your relator and as against the very purpose of the Congressional Act for the protection of railroad employees.

In *Urie* v. *Thompson,* 337 U. S. 163, an action to recover damages for silicosis, it was contended, and this Court agreed, that the Rule of the I.C.C. relating to sanders was not intended as a protection against silicosis, but was intended merely to afford additional braking power, and under the "conventional tort doctrine" would not impose absolute liability. Holding that the Boiler Inspection Act itself, irrespective of the purpose of the rule, provided the right of recovery, this Court said:

> "• • • we think the liability imposed by the Boiler Inspection Act is of broader character and that the correct rule is the one laid down in *Louisville & N. R.*

Co. v. *Layton,* 243 U. S. 617, 621, which this Court has had repeated occasion to apply in connection with the Safety Appliance Acts: 'The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,— not from the position the employee may be in, or the work which he may be doing at the moment he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever failure to obey these Safety Appliance Laws is a proximate cause of injury to them when engaged in the discharge of duty'."

Here again this Court calls attention to the fact that the Boiler Inspection Act provides the basis of the rights for recovery by railroad employees who are injured as a result of unnecessary peril arising from the use of a locomotive which a jury was warranted in finding was not in proper condition and safe to operate in the service to which it was put, even though the rule of the I.C.C. was not intended as protection against silicosis.

In *Lilly* v. *Grand Trunk Western Railroad Co.,* 317 U. S. 481, 63 S. Ct. 347, this Court, held with respect to a rule of the Interstate Commerce Commission which was not called to the attention of the trial court, namely, a rule requiring the "Top of the tender behind the fuel space be kept clean, and means provided to carry off waste water", that the presence of ice on the top of the tender involved unnecessary peril to life and limb, and that the jury was justified in finding that the presence of ice constituted a violation of the Boiler Inspection Act even in the absence of such a rule. The Court said:

"* * * Negligence is not the basis for liability under the Act. Instead it 'imposes upon the carrier an

absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary peril to life or limb.' (Citing cases) Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act. (Citing cases).

"The Act, like the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. (Citing cases).

"The use of a tender, upon whose top an employee must go, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. * * *

"Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. * * * The failure of petitioner's counsel to call Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that Act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Western Railroad Co.* v. *Lindsay,* 233 U. S. 42, especially when, as here, *the rule only fortifies a result the jury could probably have reached even in the absence of such a rule.*" (Emphasis ours)

In that case, although the railroad company did not place the ice on the tender nor was there any defect of any part or appurtenance causing it to be there, but it came about from the unavoidable and uncontrollable oper-

ation of the natural elements, the presence of ice, irrespective of the effect of any rule of the Interstate Commerce Commission was definitely determined to authorize the jury to find a violation of the Boiler Inspection Act.

By the same token, a headlight which is out of order, as the jury concededly was justified in finding with respect to the light in the subject action, constitutes a violation of the Boiler Inspection Act, irrespective of any rule which the Interstate Commerce Commission had made or might make.

The decisional law of this Court on all phases of the federally created rights for redress for injuries sustained by interstate railroad employees is controlling on and must be applied by all courts, state and federal. And this Court uniformly has held that when a railroad company installs, constructs and maintains on and as an integral part of a locomotive or tender any appurtenance, liability for proper maintenance of the appurtenance in an efficient manner is obligatory on the railroad company, by virtue of the provisions of the Boiler Inspection Act itself, irrespective of any order, actual or potential, of the Interstate Commerce Commission.

In *Hines* v. *Smith,* 275 Fed. 766, the Circuit Court of Appeals for the Seventh Circuit affirmed a plaintiff's judgment which depended on the applicability of the Boiler Inspection Act to the defective condition of an automatic bell ringer which was not prescribed or regulated by any rule promulgated by the Interstate Commerce Commission, saying:

> "It is claimed on behalf of the plaintiff, and evidence supports the contention, that the automatic bell ringer was out of order and would not ring on the night of the accident, and that it had been out of order for some time. In answer thereto, defendant asserts

that this act does not apply to bell ringers, and that the declaration does not charge a violation thereof. With neither position can we agree. The amendment of 1915 (extending the provisions of the Boiler Inspection Act to all parts and appurtenances of the locomotive, whereas formerly the Act had applied only to the boiler) we think, leaves no room for doubt. Certainly a bell ringer is a 'part' or an 'appurtenance' of a 'locomotive and tender'. While a liberal construction of this statute is not necessary to justify this conclusion, it is evident that the amendment should be liberally construed and its obvious purpose effectuated."

The United States Court of Appeals for the Eighth Circuit, in *Louisville & N. R. Co.* v. *Botts,* 173 F. (2d) 164, correctly analyzed the Boiler Inspection Act in relation to orders of the Interstate Commerce Commission, namely, holding that the Act imposes three coordinate, and not simply coincident, conditions for the lawful use of a locomotive:

"(1) All parts of the locomotive must be safe to operate without unnecessary peril to life or limb; (2) the locomotive must have been submitted to the inspection provided for in the Act; and (3) the locomotive and its parts must meet such tests and conform to such standards as the Interstate Commerce Commission may have prescribed or approved."

"These on their face are coordinate conditions and commands, and the clauses therefore are not simply coincident. Thus, under the third clause, the Interstate Commerce Commission could hardly practicably be expected to lay down specifications of every individual item or element involved in the construction of the locomotive and its parts, but plainly Congress did not intend that any such non-prescription by the Commission should operate to relieve a carrier of its absolute obligation under the first clause, not to use any locomotive that is unsafe to operate, without unnecessary peril to life or limb, in the service to which it is

> put. The mere fact therefore that the third clause of the section of the statute has not been violated does not permit of a judicial ruling that there consequently in the present situation has been no violation of the first clause."

The petitioner submits that the Appellate Court's reliance on the decision in *Auschwitz* v. *Wabash Railroad Co.*, 346 Ill. 190, decided in 1931 before the 1939 amendments of the Federal Employers' Liability Act and the current unmistakable trend of the decisions of this Court in relation to these railroad cases, is untenable. The United States Court of Appeals for the 2nd Circuit in *Bolan* v. *Lehigh Valley Railroad Co.*, 167 F. 2d 939, on almost identical facts as those involved in the *Auschwitz* case, said:

> "Accordingly, if an appurtenance conforms with the I.C.C. regulations but nevertheless violates the Act, the latter must control."

We submit that the cases of *Mahutga* v. *M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 262, and *A. T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, are clearly distinguishable from the situation in the case at bar.

In the *Mahutga* case, the plaintiff claimed a violation of the Boiler Inspection Act because the railroad company did not provide some means of fastening the cab curtain back, although no such requirement was contained in the order of the Interstate Commerce Commission prescribing in detail the requirements with respect to such curtains. The curtains, in fact, conformed strictly to the requirements of the Interstate Commerce Commission. It was not claimed, as it is in the case at bar, that there was anything out of order, defective or not properly functioning with respect to the appurtenance.

In the *Scarlett* case, the claim was that a ladder on a box car, which was not defective and which complied

with the regulations of Interstate Commerce Commission, violated the Boiler Inspection Act because round brace rods on the side of the car which formed no part of the ladder itself rendered the use of the ladder dangerous despite the fact that the ladder cleared the brace rod more than the minimum distance required by the order of the Interstate Commerce Commission for such clearance.

In the subject action, unlike those cases, there is, as the Appellate Court has said: "An issue of fact to be determined by the jury * * * if * * * (the) defect in the light can be made the basis of an action under the Boiler Inspection Act".

Contrary to the statement in the opinion of the Appellate Court that

> "No claim can be made that the projection of the rays of this light into the air created 'unnecessary peril to life or limb' in the operation of the engine,"

this Court in *Tiller* v. *Atlantic Coast Line Railroad*, 323 U. S. 574, said:

> "The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard."

The Appellate Court's statement that the defective light could not be held to "create" an unnecessary peril to life or limb evidences a grave misapprehension with respect to the requirements of the Boiler Inspection Act. It is not necessary for a defective appliance to "create" an additional hazard, but it is required that all parts and appurtenances of a locomotive should be in such condition as to avoid unnecessary perils.

It cannot be reasonably contended that a rear headlight on the tender which was in such a condition that its light

was thrown upward into the air instead of along the tracks as it was intended, entailed no unnecessary hazard and peril, or that such unnecessary hazard and peril would not have been avoided if the light had shone straight back along the tracks. If it had been in proper working order, it would have disclosed the close proximity of the coal car to the main track long before the situation was or could have been observed by the relator or by the engineer. The violation of the Federal Boiler Inspection Act contributed to cause the relator's injuries.

As was said in *Southern Ry. Co.* v. *Lunsford,* 297 U. S. 398, and as was held in *Lilly* v. *Grand Trunk Railroad Co.,* 317 U. S. 481, and *Hines* v. *Smith,* 275 Fed. 766, a defective part or appurtenance of a locomotive if actually a permanent and integral part thereof, which by reason of the defect fails to avoid unnecessary peril constitutes a violation of the Boiler Inspection Act, whether or not the part or appurtenance is required or covered by any order of the Interstate Commerce Commission.

The railroad company, knowing the service to which the locomotive was to be put, equipped it with a rear light, the only purpose of which could have been to provide for safety when the locomotive was backing in the night season, as the locomotive in the subject action was doing when relator was injured. If it were out of order, entailing unnecessary peril which would have been avoided by having the light in proper condition, the jury was warranted in finding that the Boiler Inspection Act was violated, and that such violation contributed to cause relator's injuries.

The Appellate Court's opinion finally determines the issues in this regard, and erroneously denies and deprives relator of protection under the Federal Boiler Inspection Act.

II.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Safety Appliance Act.

The Safety Appliance Act provides: (45 U.S.C. Sec. 11)

> "It shall be unlawful for any common carrier subject to the provisions of section 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

Defendant's counsel, in opening defendant's case to the Court and jury at the outset of the trial, stated among other things partially set forth in the opinion of the Appellate Court (R. 13):

> "Now I notice what Mr. Fuerst said about how the car got there. I do not know if it was put there or whether it had drifted there. In other words, if the brakes were defective in holding the car."

That statement is a plain and unequivocal admission that the Clifford siding sloped down toward the O. P. Main and was a plain statement that the defendant did not contest the fact that the brake on the coal car was defective and inefficient. The statement was never withdrawn or modified up until the time the case was submitted to the jury, and represents the theory upon which the defense was based and is binding on the defendant. *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Allen* v. *United States Fidelity & Guaranty Co.*, 269 Ill. 234; *Peters* v. *General Rug & Carpet Cleaners*, 333 Ill. App. 47; *Kluska* v. *City of Chicago*, 97 Ill. App. 665.

The opinion of the Appellate Court states:

> "The testimony relating to the brakes on the coal car is limited to plaintiff's statement that on going to

> work around 9:15 to 9:20 P. M. he saw a coal car on the spur track about 10 feet from the switch and that a regular brakeman was setting the brake * * * and that several hours later the car was so near the main track as to interfere with the operation of engines and cars on it."

It is apparent from the opinion that the above quoted statement is not literally accurate, and that there was additional evidence that the coal car drifted, due to inefficiency of the brakes, from its safe place 10 feet in on the spur to the place it occupied fouling the main track when plaintiff was crushed between it and the tender in the darkness of midnight. The relator testified, as set forth in the petition for rehearing in the Appellate Court (R. 42-44) that the brake on the coal car was not efficient. This evidence was received on the express withdrawal of an objection which the Court had sustained.

Defendant did not offer any evidence of any character to rebut relator's testimony that the brake was inefficient. It did not call the brakeman who put the coal car on the siding and applied the brake. It did not call anybody who had anything to do with moving the coal car after the accident, and it passes credulity to think that defendant left it in the position fouling the O. P. Main after it had caused injuries to one of its employees. It did not produce any profile map made on actual survey, as it certainly would have done if there were any honest question about whether the coal car drifted to its dangerous position or if there were any honest question as to its direction of the grade of the tracks.

If there was any legitimate issue as to direction of the slope or the inefficiency of the brake on the coal car, all questions relating to such issue were questions of fact for the jury which the Appellate Court cannot redetermine contrary to the determination of the jury in this case,

which is governed by the Federal Employers' Liability Act and the Safety Appliance Act.

Lavender v. *Kurn,* 327 U. S. 645.
Williams v. *New York Central R. Co.,* 402 Ill. 494.
Cusson v. *Canadian Pacific Ry. Co.,* 115 F. 2d 430.

In *Lavender* v. *Kurn,* 327 U. S. 645, it was said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The evidence offered by relator with respect to the inefficiency of the hand brake, that is, its failure to function and to keep the coal car from drifting, is substantial evidence and was sufficient to make the issue one for the jury within the decision of the United States Supreme Court in *Myers* v. *Reading Co.,* 331 U. S. 477; *Didinger* v. *Pennsylvania R. Co.,* 39 F. 2d 798 and *Philadelphia & R. Ry. Co.* v. *Auchenbach,* 16 F. 2d 550, that the hand brake on the coal car was inefficient.

To the same effect:

Spotts v. *Baltimore & O. R. Co.,* 102 F. 2d 160.
Detroit T. & I. R. Co. v. *Hahn,* 47 F. 2d 59.
Anderson v. *Baltimore & O. R. Co.,* 89 F. (2d) 629, Cert. denied, 302 U. S. 696.

Eker v. *Pettibone,* 110 F. 2d 451.
Anderson v. *Chesapeake & O. R. Co.,* 352 Ill. 561.

The Appellate Court, in stating:

> "No inference of inefficiency of the brake can be drawn from the mere fact that plaintiff saw a switchman setting the brake—an incomplete operation—* * *. It must first be shown that the brake was actually set, with due care and in the normal, natural and usual manner."

overlooked the wholly permissible and natural inference which the jury should be permitted to draw, namely, that a regular yard brakeman of defendant setting a brake would do so with due care and in the normal, natural and usual manner. This under these Federal Acts was within the province of the jury, and not within the province of the Appellate Court. Furthermore, the erroneous and gratuitous assumption by the Appellate Court in the use of the phrase "incomplete operation" is not borne out by the record. It only takes a fraction of a minute to set a brake. In railroad parlance, the relator's testimony that he saw a regular yard brakeman setting the brake means that he saw the brake applied in a proper manner,—a complete operation, which twelve jurors believed to be the fact.

III.

The relator is irreparably prejudiced and damaged by the decision of the Appellate Court and the refusal of the Illinois Supreme Court to correct it.

The only question on any new trial of this action under the opinion of the Appellate Court will be the amount of the damages to be awarded to relator by another jury. In view of defendant's admission of its liability under the Federal Employers' Liability Act, a recovery of damages by the relator in some amount is certain, inasmuch as any

negligence on the part of relator which the new jury might find contributed to cause relator's injuries would not bar, but would merely diminish, the amount of his recovery.

If the evidence on the new trial with respect to defendant's violation of the Federal Boiler Inspection and Federal Safety Appliance Act be the same as it was on the first trial, relator will be denied the benefits of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 53, to the effect that he shall not

> "* * * be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Apart from the delay in the ultimate determination of the amount of damages to which relator is entitled, the relator, by the decision of the Appellate Court, has been and will continue to be deprived of a jury determination on a new trial of the issues involved in his assertion of federally created rights under the Federal Boiler Inspection and Safety Appliance Act, which were properly determined by the jury and the Trial Court on the first trial in complete accord with the federal decisional law. On a new trial, the Trial Court would be bound to conform to the opinion of the Appellate Court, and if the evidence be the same, the relator would be deprived of his statutory rights provided for him by the Federal Safety Statutes, erroneously eliminated from this case by the Appellate Court. Any appeal by relator which might lie from the judgment in his favor at the new trial, would have to be prosecuted beyond the Appellate Court, if such discretionary appeal be allowed, to correct the errors now belaboring the case, and the only relief that could be granted would be to order

a third trial in order to restore to the relator the benefit and protection of the Federal Safety Statutes in accord with the judgment he has properly obtained or possibly to reinstate that judgment.

In other words, the decision of the Appellate Court to the effect that relator is not entitled to recover under the Boiler Inspection Act or the Safety Appliance Act is final, short of corrective action by this Court.

In these circumstances, we submit that it would be unconscionable to require relator to go through the empty gesture of a new trial, particularly since the relator has already lost over $10,000 in wages as a result of the injuries wrongfully inflicted on him by the defendant, with its attendant delay and expense, when this Court can now correct the situation, and conscientious observance of the law requires this Court to do so now.

IV.

The relator has been wrongfully deprived of his right to a trial by jury guaranteed to him by the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Article II, Sec. 19 of the Constitution of the State of Illinois.

Relator asserts and claims that he has been denied the right to trial by jury of the factual issues relative to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act, in violation of the provisions of the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and that he has been denied equal protection of the law by the decision of the Appellate Court in violation of the provision of the 14th Amendment of the Constitution of the United States.

Relator asserted and claimed his constitutional rights at the first opportunity, namely, in his motion in the Appellate Court for a rehearing and for leave to appeal to this Court (R. 31-47). Relator's constitutional rights as above set forth were infringed and violated for the first time when the Appellate Court made and filed its decision on defendant's appeal from the judgment in relator's favor. Relator duly demanded (R. 6, 7) and was properly accorded a trial by jury in the Superior Court of Cook County, and the factual issues with respect to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act were properly tried and submitted to the jury in the Superior Court of Cook County. It was not until the Appellate Court handed down its decision to the effect that relator was not entitled to recover under either of these safety statutes that his constitutional rights were invaded. He promptly and clearly claimed his constitutional rights at the first opportunity in his motions in the Appellate Court for a rehearing and for leave to appeal, and such claims were necessarily passed on by the Appellate Court when it denied the motions (R. 27-28, 31-33, 46-47).

It is perhaps unnecessary to argue the question whether the law under the recent decisions of this Court has progressed with reference to the questions involved in the case at bar to the point which overrules or modifies its decision in *Minn. & St. Louis R. R. Co.* v. *Bombolis,* 241 U. S. 211.

It is certain, however, as stated in Mr. Justice Douglas' concurring opinion in *Wilkerson* v. *McCarthy,* 336 U. S. 53, that by the recent decisions of this Court:

> "The historic role of the jury in performing that function (whether the jury function in passing on disputed questions of fact and in drawing inferences

from proven facts has been respected) * * * is being restored in this important class of cases."

As stated in *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350:

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence * * * It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act * * * The jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries' * * * To deprive these workers of the benefit of a jury trial in close but doubtful cases is to take away a good portion of the relief which Congress has afforded them."

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, it was said:

"There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. *Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.* * * * It is true that this Court has held that a state need not provide in F.E.L.A. cases any trial by jury according to the requirements of the Seventh Amendment. * * * But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question." (Emphasis ours.)

This Court said in *Brown* v. *Western Railway of Alabama*, 338 U. S. 294:

"Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springs the

State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis* v. *Weschler, supra,* 263 U. S. at page 24; Cf. *Maty* v. *Grasselli Chemical Co.,* 303 U. S. 197. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, *desirable uniformity in adjudication of federally created rights could not be achieved.* See *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479." (Emphasis ours.)

The Appellate Court's opinion clearly demonstrates, and its decision constitutes, an invasion of relator's constitutional rights by repudiating, without any justification, the jury's fact-finding function in this case as to relator's right to recover under both safety statutes. Furthermore, in order to contravene and intercept the rights to a jury determination of the factual issues in that connection, and to the equal protection of the law, guaranteed to plaintiff by the Federal and State Constitutions, the Appellate Court ingeniously devised its own findings of fact contrary to those of the jury imported by its general verdict, and its own interpretation of the Boiler Inspection and Safety Appliance Acts, thereby completing its denial of plaintiff's constitutional rights.

It ignores the commands of the decisional law of this Court, requiring uniform administration and equal protection of plaintiff's federally created rights.

It is now clear, from the language of the Court, and the actual decisions in the *Urie* and *Brown* cases, *supra,* that the twilight zone of distinction between substantive and procedural rights heretofore existing has been abolished; that the intent and purpose of the Congressional enactments in the Federal Employers' Liability Act, the Fed-

eral Boiler Inspection Act, and the Federal Safety Appliance Act, must be administered with equality and uniformity throughout the entire nation, whether the appeal for justice be to a Federal or to any State Court; and that all cases arising under these Federal Acts shall be determined as to substance, notwithstanding any local procedural law, in accordance with the federal decisional law. It is equally clear that these rules and principles have been flagrantly violated in the subject action.

In *Urie* v. *Thompson,* 337 U. S. 163, it was said:

> "Whatever the effect of the state supreme court's ruling for further proceedings in the state courts, it could not impose such an alternative upon petitioner (waiving the right to a new trial). Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."

As we have before pointed out, the Appellate Court's decision to the effect that the relator cannot recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act is final and deprives the relator of the equal protection of the law and "desirable uniformity in adjudication of federally created rights."

It is submitted that in the situation in which the relator has been put by the decision of the Appellate Court, the only effective remedy open to him is by review and reversal or expunging of the Appellate Court's decision at this stage of the proceedings, and that any obstacle of a technical or procedural nature should not deter this Honorable Court in reviewing that decision. To all intents and purposes it is final as to relator's right to recover under the Federal Safety Statutes. It is grossly and in-

defensibly wrong and the relator has no remedy except in the hands of this Court.

Respectfully submitted,

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